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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1836

COOPERS & LYBRAND,
Petitioner,

v.

CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

No. 76-1837

PUNTA GORDA ISLES, INC., *et al.*,
Petitioners,

v.

CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the Eighth Circuit

**REPLY BRIEF FOR PETITIONER
COOPERS & LYBRAND**

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ARGUMENT

**I. The Court of Appeals Was Without Jurisdiction of the
Appeal From the Decertification Order.**

Coopers & Lybrand does not propose to reargue those points
covered in its opening brief or to respond in intimate detail to

the many unsupported contentions advanced in respondents' brief. Rather, this reply brief will concentrate only on the more serious shortcomings in the arguments proffered to this Court by respondents.¹

Throughout their brief, respondents seek to describe a "parade of horrors" which they predict would follow in the wake of this Court's rejection of the death knell doctrine. In almost every instance, the scene depicted is based upon unfounded conjecture, a distortion of the underlying facts and/or a misapplication of the controlling legal precepts. As a result, many of respondents' assertions which appear plausible at first blush cannot withstand close scrutiny.

A. Respondents Have Misconceived the Purpose of the Death Knell Doctrine and Are Asking This Court to Use Rule 23 Improperly to Enlarge the Jurisdiction of the Appellate Courts and to Expand the Substantive Rights of Class Action Plaintiffs.

Respondents' argument is punctuated with statements urging that adoption of the death knell doctrine is essential in order: to "open the courts to small claimants who could not afford to bring suit on an individual basis" (Resp. Br. 22); to avoid "[s]tripping a small claim-holder of the right to bring a class action" (Resp. Br. 23); and to protect and enhance "respondents' right to litigate their individual claim—which right as a practical matter depends on utilization of Rule 23 . . ." (Resp. Br. 30). This line of reasoning betrays two fundamental misconceptions which permeate respondents' analysis of the issues presented by this case:

1. The death knell doctrine was not conceived—and has never been applied—for the purpose of creating a special right of action

¹ Appropriate comments about respondents' Statement of the Case will be included in Point III of the Argument, *post*.

or a unique right of appeal in the class member who happens to win the race to the courthouse and thus the opportunity to represent the class. The *only* purpose for the doctrine was to ensure that the refusal to certify does not forever foreclose appellate review of the appropriateness of class action treatment. *Hooley v. Red Carpet Corporation*, 549 F.2d 643, 645 (9th Cir. 1977). In the seminal opinion in *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119, 120 (2d Cir. 1966) (*Eisen I*), the court announced that the principal consideration supporting the creation of the death knell doctrine was that in the absence of an immediate appeal ". . . no appellate court will be given a chance to decide if this class action was proper under the newly amended Rule 23." Hence, respondents' repeated insistence that this Court must endorse the doctrine so as to permit them to pursue their individual claim is based on an erroneous view of the purpose of the death knell doctrine.

2. By advocating that the death knell concept should be adopted in order to guarantee that small claimants will not be stripped of their incentive to engage in litigation, respondents are asking this Court to stretch § 1291 far beyond its plain meaning for the purpose of creating *substantive* rights in respondents and their attorneys. In essence, respondents are urging this Court to violate the Rules Enabling Act, 28 U.S.C. § 2072, and Rule 82 of the Federal Rules of Civil Procedure.²

Respondents obviously believe that Rule 23 creates substantive rights in class action plaintiffs—rights which will encourage them to resort to the legal process and without which they might

² The Rules Enabling Act, which authorizes this Court to prescribe rules of procedure for the lower federal courts, also provides that "such rules shall not abridge, enlarge or modify any substantive right . . ."

Rule 82, Fed. R. Civ. P., states:

"These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

very well forego litigation (Resp. Br. 22-23). Whether or not that is the effect of Rule 23 is really beyond the scope of this case.³ It is abundantly clear, however, that Rule 23 cannot be utilized to expand the boundaries of appellate jurisdiction as delineated in 28 U.S.C. § 1291. Congress in 1934 authorized this Court to prescribe procedural rules, but:

“ . . . gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts.” *United States v. Sherwood*, 312 U.S. 584, 590 (1941).

Therefore, contrary to the thesis underlying respondents’ entire presentation, Rule 23 cannot be used or construed “to extend or restrict the jurisdiction conferred by a statute.” *Snyder v. Harris*, 394 U.S. 332, 337-38 (1969), quoting from *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941).

Respondents’ Point 2(b) (Resp. Br. 26-29) is wholly predicated upon the assumption that § 1291 was designed to be subservient to Rule 23 and that the jurisdictional statute must be construed so as not only to preserve but to enlarge the rights of class action plaintiffs, thereby admittedly increasing the number of class actions filed. Respondents’ efforts to elevate procedural rules to such prominence and to bend the words of Congress to create substantive rights through those rules should be rejected.

B. The Death Knell Doctrine Embodies an Improper Reading of § 1291 and Is Inconsistent With the Purposes of the Final Judgment Rule.

Several well-settled jurisdictional propositions have been completely ignored in respondents’ advocacy. Among these are

³ Respondents are guilty of serious hyperbole when they assert that a “major purpose” of the drafters of Rule 23(b)(3) was the substantive one of increasing access to the courts (Resp. Br. 22). See *Advisory Committee’s Notes to Proposed Rule 23 of Rules of Civil Procedure*, 39 F.R.D. 98 (1966).

the rules (i) that an order cannot be deemed final unless its “necessary result” is termination of the litigation and that “[a]ppeal rights cannot depend on the facts of a particular case,” *Carroll v. United States*, 354 U.S. 394, 405 (1957); (ii) that the jurisdiction of federal courts is a matter for Congress, *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181-82 (1955); (iii) that “clear statutory mandate must exist to found jurisdiction,” *Carroll v. United States*, *supra* at 399; and (iv) that Congress, by enacting 28 U.S.C. § 1292(b), has defined those orders which it deems appropriate for interlocutory review. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 746 (1976).

Even a casual reading of respondents’ brief leads to the inescapable conclusion that adoption of the death knell doctrine would spawn confusion and uncertainty and would precipitate countless requests for *ad hoc* determinations of finality. Such a prospect would, of course, be completely antithetical to the certainty sought by Congress in enacting and adhering to the final judgment rule, which, after all, is the “dominant rule” of appellate practice. *DiBella v. United States*, 369 U.S. 121, 126 (1962). In addition, the very reason cited by respondents in their support of the death knell rule—the fact that it encourages litigation—is squarely at odds with one of the main purposes of the finality requirement, which is to “discourage undue litigiousness.” *Id.* at 124.⁴

Nowhere in their brief do respondents explain how an order which does not even operate on a plaintiff’s claim can or should be deemed “final” merely because his lawyer finds it economically

⁴ Respondents urge this Court to adopt a “practical” approach to finality in this case (Resp. Br. 20). But they fail to indicate how the death knell concept is “practical.” Conversely, more than a decade of experience in the Second Circuit and elsewhere has demonstrated convincingly that the doctrine is impractical, if not impossible, for appellate courts to administer on a case-by-case basis.

inexpedient to proceed further.⁵ Respondents do not propose any formulation of a death knell rule which would not also permit appeals of numerous other orders by any plaintiff who could convincingly argue that he would abandon the litigation if not allowed a prompt appeal. Nor do they suggest any effective way of obviating or neutralizing the avalanche of interlocutory appeals which would inevitably follow from this Court's adoption of the death knell doctrine.

1. None of this Court's previous decisions call for acceptance of the death knell theory.

Respondents rely heavily on the three-paragraph *per curiam* opinion of this Court in *Roberts v. United States District Court*, 339 U.S. 844 (1950), as authority for permitting death knell appeals. *Roberts*, however, presented a decidedly different question than is posed here. The Court in *Roberts* held that a denial by a district judge of a motion to proceed *in forma pauperis* was an appealable order. Obviously, such a ruling by the trial court *ipso facto* ended the case before it began because the pauper would be unable to pay the filing fee and, consequently, would never even get into the Clerk's office. The limitations of the *Roberts* rationale were demonstrated in *Miller v. Pleasure*, 425 F.2d 1205 (2d Cir. 1970), where the court refused to allow an appeal from an order refusing to appoint counsel for an indigent civil plaintiff. The Second Circuit held that *Roberts* was not in point and commented on the unique nature of an order denying leave to proceed *in forma pauperis*:

⁵ Respondents erroneously argue that the trial court's decertification order is "final," despite the clear language of Rule 23 making such orders conditional, because "it is not predicated on facts that can change" (Resp. Br. 24). Assuming that problems of manageability, among others, can be overcome, a class action is still a possibility in this dispute if one or more of the major claimants, who might be adequate class representatives, would either intervene or file their own class suit. Thus, it cannot be said that the issues framed by this lawsuit will never be adjudicated on a class-wide basis.

"Such an order closes the door to the courthouse to a plaintiff having a right to enter if he is indigent as he claims; an order declining to request an attorney to represent him simply denies an added facility in the prosecution of his claim which Congress has left to the discretion of the court." *Id.* at 1205.

A refusal to permit a plaintiff to represent a class is clearly not tantamount to a refusal to permit him even to file his lawsuit. In 15 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE, § 3912, p. 512, the authors reject *Roberts* as a basis for the death knell doctrine, pointing out that: "The effect of denying class action status, however, is not automatically equivalent to the preclusive effect that may result from denial of pauper status."

Respondents also invoke *United States v. Nixon*, 418 U.S. 683 (1974), and *Brown Shoe Company v. United States*, 370 U.S. 294 (1962), in alleged justification of the death knell doctrine (Resp. Br. 20). Neither of these decisions supports expansion of the finality rule to encompass death knell appeals. *Nixon*, of course, arose in a "unique setting" involving discovery from the President of the United States. *Brown Shoe* confronted a difficult jurisdictional problem under the Expediting Act in a complicated antitrust case where the remedy of divestiture required a cautious application of the finality requirement.

The fact that this Court on occasion has permitted appeals in distinctive settings such as *Nixon* and *Brown Shoe* scarcely requires, or even supports, the endorsement of a sweeping new rule of appealability which would have a profound impact on thousands of cases each year.

2. Respondents have misread and misapplied *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977).

As indicated previously, respondents, in their struggle to portray the death knell doctrine as consistent with the purposes

of the final judgment rule, have conjured up a series of hypothetical consequences which they foresee as flowing from rejection of the doctrine. Many of respondents' examples are infected with a distorted view of intervention and of this Court's holdings in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), and *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). Most preposterous, perhaps, is respondents' suggestion that "rejection of the death knell doctrine would enhance rather than reduce the likelihood of piecemeal appeals" (Resp. Br. 25). The asserted basis for this statement is that another class member, intervening pursuant to *United Airlines, Inc. v. McDonald*, would present an inadequate record to the appellate court concerning *his* qualifications to lead the class. Elsewhere (Resp. Br. 28), respondents characterize the intervenor's purpose as the trial of his own individual claim to a conclusion before testing the validity of the earlier class action denial, thus supposedly fostering the "one-way intervention" referred to in *American Pipe*. Neither of these profiles of a *McDonald*-type intervenor is accurate.⁶

In *McDonald*, Stewardess McDonald intervened after settlement of the *Romasanta* action only for the purpose of contesting the prior ruling refusing class certification. She was not seeking to be named class champion or to litigate her individual claim but was requesting only a declaration that the originally proposed class, with Stewardess Romasanta as class representative, was an appropriate one for certification. The limited nature of her role is apparent from Mr. Justice Stewart's opinion for the Court, 432 U.S. at 390, where he characterized the Seventh Circuit as holding that the trial court had erred "in refusing to certify the class as described in the *Romasanta*

⁶ Respondents' concern over what they call "one-way intervention" is unfounded and purely hypothetical because it is predicated on the extremely unlikely prospect of an intervenor's litigation of his own individual claim in their case after they have suffered a dismissal. In any event, the remote possibility of such an occurrence is hardly justification for the death knell doctrine because (a) statute of limitations problems discourage putative class members from abiding such

complaint." As to the narrow purpose of McDonald's motion to intervene, the Court said, *l.c.* 392:

"That purpose was to obtain appellate review of the District Court's order denying class action status in the *Romasanta* lawsuit . . ."

Accordingly, the theoretical chaos concocted by respondents is simply non-existent. As a matter of practical fact, a class member desiring either to lead the class or to try his or her own individual claim would merely file a separate lawsuit. There would be no need or reason to intervene in a previously uncertified or dismissed action. The intervention contemplated by *McDonald*—that which renders the death knell doctrine superfluous—is solely for the purpose of appealing the refusal to certify the class action. Despite respondents' rhetoric, this use of the intervention mechanism does not create a multiplicity of lawsuits or appeals.

Respondents' criticism of *McDonald*, based upon their professed concern that other class members may be unaware of the pendency of the action, is refuted by the uncontroverted facts in this case. The record clearly reveals the existence of several large claimants who are fully aware of this litigation, who have expressed their willingness to help finance it, and who have instructed their lawyers to protect their rights (Apdx. 151-53).⁷

litigation, and (b) death knell appeals would have little or no effect in reducing the opportunities for such delay by putative class members since the same opportunity is present in every test case and in every denial of class certification in a case brought in the first instance by a plaintiff with a viable individual claim.

⁷ Respondents indulge a false premise when they intimate that the judicial system has a duty to assume an affirmative, paternalistic role in order to protect potential litigants who have not asserted any claims and who are not vigilant or interested enough even to follow the litigation which is pending. Respondents' reliance on the so-called "right to remain passive" (Resp. Br. 28) finds no support in the law and is nothing more than another outgrowth of respondents' faulty premise that Rule 23 creates substantive rights. To the extent that respondents would require the courts to serve as watchdogs for otherwise disinterested class members, their suggestion misperceives the function of the legal process.

3. The death knell doctrine is decidedly unfair to defendants.

Respondents engage in further artificiality when they assert that the death knell doctrine does not discriminate against defendants (Resp. Br. 31-32). The advantage that respondents seek through the death knell doctrine is one of timing. It is an advantage which is critical—and often dispositive—in class actions. The death knell doctrine would permit an immediate appeal by a class action plaintiff from a denial of class certification without requiring the plaintiff to await final judgment on his individual claim. Defendants, on the other hand, faced with an order certifying a class, must endure massive discovery and a lengthy trial, with all its attendant risks, hardships, inconvenience and expense, before ever having a chance to challenge the order which subjected them to that ordeal. The discrimination is as real as it is prejudicial.⁸

It may be true, as respondents argue (Resp. Br. 32), that there are other motions which produce appealable orders if granted but not if denied (or *vice-versa*); but the examples cited by respondents are distinguishable in two important respects: (a) Finality is the immediate result of the appealable order itself and does not depend upon a strained reading of §1291 or an economic decision by a lawyer; and (b) although the grant of such a motion may produce an appealable order, whereas a denial would not, there is no systematic imbalance in favor of or against either plaintiffs or defendants because, for example, an order granting a final summary judgment is

⁸ The Second Circuit has recently counseled that in formulating judge-made exceptions to jurisdictional statutes:

"There is also the consideration of fairness as between the putative class and the party opposing the class [citation omitted]. Under any theory allowing appeal from denial of class status but not from class certification, the party opposing the class does not have equal access to review." *Williams v. Wallace Silversmiths, Inc.*, 566 F.2d 364, 367-68 n. 4 (2d Cir. 1977).

appealable by the losing party, regardless of whether he is the plaintiff or the defendant. The death knell doctrine, by contrast, always works in favor of the plaintiff and against the defendant.

In actual practice, it is probably true that the grant of class certification is more frequently the "death knell" of a case than a refusal to certify. At any rate, it is frivolous for respondents to contend that the death knell rule is "even-handed" in its treatment of plaintiffs and defendants. The only "even-handed" rule is one which either permits both plaintiffs and defendants to appeal the class determination immediately or requires both to obtain §1292(b) certification or await the final disposition of the case. *Cf. Morris v. Gressette*, 425 F.Supp. 331, 341 (D.S.C. 1976), *aff'd*, 432 U.S. 491 (1977).⁹

4. The death knell has not rung in this case under any formulation of the doctrine.

Even if the death knell theory is endorsed by this Court, the decertification order in this case was not appealable. Cecil Livesay's own characterization of his claim as viable (Apdx. 72-73), his counsel's previous representations of viability to the Eighth Circuit (Apdx. 106), and the vigorous pursuit of this case after the decertification order (Apdx. 16) combine to demonstrate that the death knell had not sounded.¹⁰ Additionally, under the Ninth Circuit's version of the death knell the-

⁹ Respondents' excuse (Resp. Br. 43-45) for disdaining §1292 (b) simply begs the question. Since they had no "right" to appeal under §1291, the required use of the certification process under §1292(b) would, *a fortiori*, not impinge on any such "right."

¹⁰ Contrary to respondents' contention (Resp. Br. 37, 43), the district court did not *find* that the basis for a death knell appeal had been established. Moreover, the statement of the trial judge referred to by respondents (Apdx. 166) was made in a different context almost two years prior to the decertification order.

ory, the decertification order was not appealable because of the presence of other class members willing and able to pay the costs, to litigate, or to intervene (Apdx. 151-52).

Respondents challenge the Ninth Circuit's adaptation of the death knell doctrine, which forbids an immediate appeal if *any* class member has a viable claim, because they say the Ninth Circuit rule is "not subject to easy application and would seriously complicate the litigation" (Resp. Br. 33). By urging rejection of the Ninth Circuit rule, respondents effectively concede—and properly so—that the decertification order in this case was not appealable under the holding in *Hooley v. Red Carpet Corporation*, *supra*.

To the extent that respondents suggest that the *Eisen I* death knell theory is less complicated or easier to apply than the Ninth Circuit rule, that thesis is completely without merit if all of the relevant factors are taken into account.¹¹ In fact, the very criticisms leveled by respondents at the Ninth Circuit doctrine are compelling arguments for disapproval of any form of death knell appeal. Furthermore, application of the Ninth Circuit rule presents no problem in the present case because several large claimants are clearly identified in the record.

Respondents' discussion brings to light yet another problem lurking in the *Eisen I* death knell rubric by stressing that the Court of Appeals was justified in making its *nisi prius* determination of nonviability on the basis of their "counsel's representation" that the case would be abandoned (Resp. Br. 35). Besides further highlighting the facts that the choice belongs to the attorney rather than the client and that the lawyer can always be expected to announce his disinclination to represent a single individual, this argument also illustrates that the death knell doctrine, in the form that respondents espouse it, creates

¹¹ See Coopers & Lybrand Main Brief 25; Punta Gorda Main Brief 13-19.

an ethical problem by making the plaintiff's counsel a likely witness on a substantive matter, in possible violation of Ethical Consideration 5-9 and Disciplinary Rule 5-101(B) of the Code of Professional Responsibility.

* * * * *

The final judgment rule has endured well and has effectuated the sound policy of preventing piecemeal appeals and the over-burdening of our judicial system. The death knell doctrine clearly represents a "compromise of the principles of appellate review." *Share v. Air Properties G., Inc.*, 538 F.2d 279, 283 (9th Cir.), *cert. denied*, 429 U.S. 923 (1976). Noting the "obvious difficulty in administering" the rule and the "great temptation to attribute finality to orders granting or denying class action status," the authors of *WRIGHT & MILLER*, *supra*, §3912, pp. 513, 522, offer the following observations:

"The death knell doctrine responds to this temptation, but in highly unsatisfactory fashion. It requires drawing unsatisfactory *ad hoc* lines to distinguish the cases that are presumed to be fatally afflicted by erroneous class action rulings. Worse, it does not provide any means at all for responding intelligently to the desirability of granting or denying appellate review in cases falling outside the death knell lines. If appeals are to be allowed as a matter of right under a finality theory, the theory should be developed in other terms."

The death knell doctrine can never apply in instances where a successful plaintiff is allowed to recover attorneys' fees, such as civil rights cases.¹² Thus, its reach has been restricted mostly to securities cases and to some antitrust litigation. *Hackett v. General Host Corporation*, 455 F.2d 618 (3d Cir.), *cert. de-*

¹² See 42 U.S.C. §2000e-5(k); 42 U.S.C. §1988; *Johnson v. Ne-koosa-Edwards Paper Co.*, 558 F.2d 841 (8th Cir. 1977), *cert. denied*, — U.S. —, 46 U.S.L.W. 3293 (1977); *Williams v. Mumford*, 511 F.2d 363 (D.C. Cir.), *cert. denied*, 423 U.S. 828 (1975).

nied, 407 U.S. 925 (1972). But even though its scope is somewhat confined, the doctrine is a distortion of the final judgment rule, is incompatible with the philosophy forbidding piecemeal appeals, has created confusion and encouraged abuse, and is simply unworkable and undesirable. Its final requiem should be conducted by this Court.

C. The Decertification Order Was Not Appealable Under Either *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949), or *Gillespie v. United States Steel Corporation*, 379 U.S. 148 (1964).

Respondents, recognizing the slender reed on which they lean in attempting to defend the death knell doctrine, also assert that the jurisdiction of the Court of Appeals was proper under *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949), and *Gillespie v. United States Steel Corporation*, 379 U.S. 148 (1964) (Resp. Br. 38-43).

Respondents cite not one single case in which appellate jurisdiction of an order refusing class certification has been sustained on the basis of the collateral order doctrine announced in *Cohen*. Nor has our research turned up any such case. Quite to the contrary, the authorities cited by way of example only in footnote 8 of our opening brief reveal that the collateral order doctrine has been consistently and unanimously rejected as a basis of review of refusals to certify class actions. Such a refusal does not "finally" determine any "claims of right" because (i) it is avowedly subject to alteration under Rule 23 (c)(1), and (ii) no "claims of right" of the plaintiff are affected since maintenance of a class action as such is purely a procedural matter. No "claims of right" of other putative class members are lost because they retain the opportunity to seek class relief through *McDonald*-type intervention or in a separate suit. In *Williams v. Mumford*, *supra* at 369, the court

articulated some of the reasons why the collateral order doctrine has never been applied to class certification denials:

"In this case, the refusal to certify a class action did not determine collateral claims completely independent of the merits of the case. The order is indistinguishable from other procedural determinations made in the course of discovery and trial. No funds were required to be expended as in *Eisen*, nor rights granted under independent statutes to be dispensed with as in *Cohen*. Above all, the correctness of the District Court's decision is subject to effective review on appeal from final judgment."

The class action determination, by definition, is not a separable and collateral matter but, in most instances, requires an analysis of the nature of the named plaintiff's claim and a review of the issues presented by the case to determine whether common or individual questions predominate. As *WRIGHT & MILLER, supra*, § 3912, p. 511 says:

"The class action situation, however, presents problems that distinguish it from collateral order reasoning.

. . .

"Turning first to the more fundamental distinction, great difficulty is encountered in separating denial of class action status from the merits of the underlying litigation."

Furthermore, the typical refusal to certify does not present any "serious and unsettled question" within the meaning of *Cohen*, and the issue can be fully reviewed on appeal from a final judgment. In *re Piper Aircraft Distribution System Anti-trust Litigation*, 551 F.2d 213 (8th Cir. 1977).

Nor can respondents derive any comfort from *Gillespie v. United States Steel Corporation, supra*. That case involved an extremely unusual fact situation and has been rarely used as

a basis for interpreting §1291. Its doctrine has been described as residing in a "dismal limbo," WRIGHT & MILLER, *supra*, §3913, p. 535, and has never been applied in the class action context. Although *Gillespie* did appear to depart rather radically from previous decisions applying the final judgment rule:

"Perhaps the best explanation of the opinion is that the Court was attempting to formulate a rule that would allow disposition on the merits of appeals that had mistakenly been taken from non-final decisions." WRIGHT & MILLER, *supra*, §3913, p. 534.

Gillespie, which ruled narrowly in a fairly esoteric jurisdictional context, cannot be used as a wedge to open a broad new breach in the final judgment wall through which would surge a tide of interlocutory appeals in an enormously large class of cumbersome cases.

D. Respondents' Defense of Class Actions Is Irrelevant to the Issues Presented by This Case.

Respondents have devoted a sizable portion of their brief to an apologia for the class action (Resp. Br. 45-54). This entire discussion is irrelevant to the questions presented by this case since neither the validity nor the interpretation of Rule 23 is involved here, except insofar as respondents have attempted to use that procedural rule to create and enlarge their substantive rights.

We are constrained nonetheless to respond directly to some of the unfounded statements about our stance and about class actions contained in respondents' presentation. At the outset, it should be noted that proper articulation of the issues belies respondents' accusation that petitioners have demonstrated a "callous" contempt for the needs of persons with limited means or small claims (Resp. Br. 47-48). Allocation of the limited

federal appellate resources is a difficult task which inevitably forecloses some would-be appellants. Our position is simply that the forthright application of the finality requirement of § 1291, mitigated through proper application of those exceptions to finality created by Congress or already recognized by the Court, is the best way to allocate those limited resources. See Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969). We have also questioned whether a rule which encourages and rewards litigation by the *smallest* of several possible claimants is appropriate.

We must register skepticism about respondents' implicit suggestion that class actions invariably make substantial contributions to a better society. For every example of a significant monetary or injunctive recovery benefiting class members, there are corresponding examples of class actions clogging the courts with unmanageable classes or *de minimis* individual injuries.¹³ Indeed, respondents' own "authority," a document published by the Senate Committee on Commerce, *Class Action Study*, 93d Cong., 2d Sess. (Comm. print. 1974) (hereinafter "*Study*"), shows that class monetary relief was obtained in only 14 of the 120 damage class actions studied and that only six or seven cases proceeded to final judgment after trial (*Study* at pp. 10, 19).

¹³ See, e.g., *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974) (class action denied when individual claims for hotel telephone overcharges averaged \$2.00); *Holland v. Goodyear Tire & Rubber Co.*, 75 F.R.D. 743 (N.D. Ohio 1975) (class certification denied when trebled individual recovery was approximately \$9.75); *Cotchett v. Avis Rent A Car System, Inc.*, 56 F.R.D. 549 (S.D. N.Y. 1973) (class action denied when individual claims were \$1.00); *American Servicemen's Union v. Mitchell*, 54 F.R.D. 14 (D.D.C. 1972) (proposed class consisted of all American citizens who have advocated or intend to advocate unpopular ideas); *United Egg Producers v. Bauer International Corp.*, 312 F.Supp. 319 (S.D.N.Y. 1970) (proposed class consisted of all consumers of eggs in the United States).

Respondents' statistical analysis of class actions is both misleading and of extremely limited probative value because it is based on a very small and selective sample. The statistical part of the *Study*, on which respondents place heavy emphasis (Resp. Br. 49-52), summarizes the results of an analysis of only 120 class actions in which damages were sought. All of these actions were filed in a *single federal district*—the District of Columbia—which is hardly a typical forum. To the extent that respondents rely on data about the filing of class actions to minimize their impact on the court system, they ignore the fact that class actions take longer to process. Thus, the percentage of pending civil cases represented by class actions is consistently at least 150% greater than the percentage of new class action filings. See 1977 *Annual Report of the Director, Administrative Office of the United States Courts*, p. 121.¹⁴ The evidence that respondents contend "strongly refutes" the contention that class actions tend to extort settlements in unmeritorious cases (Resp. Br. 50), is based only on *interviews with two lawyers*, which, we submit, are far less persuasive than the observations of federal judges who have seen, touched and endured such cases on a regular basis. *Compare Study* at pp. 9-10, with *Coopers Br.* 31-32, n. 23.

For what they are worth, the *Study's* statistics actually confirm many of the observations contained in our opening brief. They show that the number of class actions filed in the District of Columbia increased by 700% from 1967 to 1972 (*Study* at p. 5). The fact that only six or seven of the 120 cases were litigated to conclusion confirms that class actions are "rarely" tried. Although class recoveries were not literally "consumed" by costs and attorneys' fees, the *Study* also supports our expressed conviction that the death knell fight is a "lawyers' fight."

¹⁴ The statement to the contrary in the *Study* quoted by respondents must be discounted because, among other things, the *Study* was admittedly based on "a disproportionate number of cases of shorter duration." *Study* at p. 11.

While the numbers are so small as to be virtually meaningless, more than 10 percent of the cases studied resulted in awards of fees to the plaintiffs' attorneys in excess of 50% of the total recovery (*Study* at pp. 21, 29). In view of the fact that the death knell doctrine operates almost exclusively in the antitrust and securities law areas, the following comment from the *Study* is particularly enlightening:

"Antitrust and securities actions accounted for the largest fees comprising all the suits involving fees of over \$500,000 and 85 percent of the cases with fees between \$100,000 and \$500,000." *Id.* at p. 29.¹⁵

To reiterate, however, the relevance of any statistics or observations about such matters lies merely in gaining an appreciation of the context in which the death knell doctrine would expand the number of appeals by plaintiffs as a matter of right. These problems and this unusually great potential for abuse are important, not because the Court should abolish or restrict class actions, but because they counsel against granting class action plaintiffs a special, preferred status that would expand these problems into the appellate courts.

II. Since Respondents Did Not File a Cross-Petition for Certiorari, the Court of Appeals' Dismissal of Their Mandamus Petition Is Not Before This Court.

Respondents urge that if the Court of Appeals is determined to have been without appellate jurisdiction, this Court should remand the case to the Eighth Circuit for reconsideration of

¹⁵ The *Study* took note of the prevailing concerns that "the primary purpose in bringing the suit as a class action, even though an individual suit might have been in the client's best interest, was to obtain large attorney's fees" and that "plaintiffs' attorneys may gain more than any individual class member." (*Study* at p. 22).

respondents' mandamus petition, which was dismissed as moot (Resp. Br. 54-55). However, respondents' request for an alternative remedy is not properly before this Court because they did not cross-petition for certiorari. *Strunk v. United States*, 412 U.S. 434 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 462 (1941); *Helvering v. Pfeiffer*, 302 U.S. 247 (1937); *Alexander v. Cosden Pipe Line Co.*, 290 U.S. 484 (1934); *Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U.S. 52 (1927).

Respondents' reliance on *Dandridge v. Williams*, 397 U.S. 471 (1970), and *Langnes v. Green*, 282 U.S. 531 (1931), is misplaced. Those cases, following *United States v. American Railway Express Company*, 265 U.S. 425, 435-36 (1924), held that a cross-petition is not necessary where the respondent "does not attack, in any respect, the decree entered below," but instead "merely asserts additional grounds why the decree should be affirmed." But where alteration of the Court of Appeals' ruling in the manner requested by the respondent would not result in an affirmance of its judgment, a cross-petition is required. *Mills v. Electric Auto-Lite Co.*, *supra* at 381, n. 4. In the case at hand, respondents are not seeking an affirmance of the Court of Appeals' judgment on alternative grounds. Instead, they are asking this Court to vacate the Eighth Circuit's dismissal of their mandamus petition, thereby reviving a claim and a separate theory of relief which they have abandoned. This they cannot do in the absence of a cross-petition.

The obvious distinction between an appeal and a mandamus proceeding was acknowledged by respondents in the Court of Appeals when they filed their petition for mandamus in a proceeding which was separate and apart from the purported appeal, and by the Eighth Circuit when it was assigned a separate docket number in that court. Whereas in the appeal respondents asked for a reversal of the district court's order, the

mandamus petition requested a peremptory writ commanding the district judge to recertify the class. Mandamus is an extraordinary and drastic remedy containing its own standard of review, and it is not a substitute for an appeal. *Will v. United States*, 389 U.S. 90 (1967).

In *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 175 (1937), the Court held that in the absence of a cross-appeal by the plaintiff, it was error for the Court of Appeals to affirm the judgment for that plaintiff on the theory of specific performance when the trial court had based its judgment on a breach of a duty of exoneration. The Court emphasized that the judgment as revised by the Court of Appeals involved a "modification of the decree itself," and that the relief granted was modeled upon different legal principles. *Id.* at 191. Hence, when a respondent urges a different form of judgment or seeks a different type of relief, he must cross-petition. Respondents here have failed to preserve their mandamus theory, and there is no basis for remanding this case to the Court of Appeals.¹⁶

III. The Court of Appeals' Reversal of the Decertification Order Was Erroneous.

In attempting to justify the ruling of the Eighth Circuit, respondents disregard the Court of Appeals' clear departure from the applicable scope of review and persist in their attack upon the district judge and petitioners by blaming them for the delay which respondents themselves occasioned. Since the issue is whether the district court's view of respondents as class representatives was so warped as to warrant interlocutory intervention by the appellate court, it is respondents' conduct, not that of

¹⁶ If respondents were actually seeking to support the result reached by the Eighth Circuit, the appropriate course for this Court would be to decide the validity of the decertification order, inasmuch as that question was presented in *Coopers & Lybrand's Petition for certiorari*.

the judge or of petitioners, which is on trial and which must be shown to be so clearly above reproach that the trial judge had no conceivable basis for his decertification order. Respondents have not made and cannot make such a showing.

Though accusing the district court of procrastination in ruling on the class certification motion (Resp. Br. 57), respondents fail to explain why they waited nine months before seeking class certification while conducting discovery, not on the class action issues, but on the merits of the case (Resp. Br. 3, Apdx. 2, 4). Once respondents' motion for class certification was finally filed, the district court's prompt actions are completely at variance with respondents' allegations of delay. On June 7, 1974, the initial phase of briefing in connection with respondents' motion was completed (Apdx. 7). On June 18, the court set the motion down for oral argument, which was held on June 24 (Apdx. 87-91). Less than a month later, on July 19, 1974, the district court issued its order ruling that individual proof of reliance would not be required of each member of the class (Apdx. 91-93).

Consistent with its intentions announced at the oral argument on the class motion, the court did not in its order of July 19, 1974, either grant or deny respondents' motion for class certification (Apdx. 89, 91-93; Tr. of 6/24/74, p. 37). Instead, it awaited the presentation of further evidence from respondents pertaining to the suitability of the case for class action treatment. This information was not forthcoming for more than five months, during which period respondents, by various stratagems, sought to bypass the difficult class action issues and force the district court into opening up discovery on the merits (Apdx. 96-97, 103-07). Respondents now seek to excuse this delay on the grounds that the district court "did not order a hearing" (Resp. Br. 4). Nevertheless, it was clear to all involved that the district court believed that an evidentiary hearing was necessary and that, in any event, the burden of perfecting the suit for class

treatment was on respondents. Indeed, respondents subsequently acknowledged their obligation when, on November 18, 1974, they finally requested the class action hearing (Apdx. 108-09).

Once respondents asked for the hearing, the district court again acted with dispatch. On November 27, 1974, the court suggested to counsel that the hearing be held in December, and it was set for and held on December 30 (Letter dated Nov. 27, 1975, from Hon. H. K. Wangelin to counsel of record; Apdx. 9, 109-66). Preparation of the transcript of the hearing and filing of post-hearing briefs by all parties was not completed until May 24, 1975 (Apdx. 11). The motion for class certification was submitted to the district court shortly thereafter and, once again, was disposed of in less than a month. On June 19, 1974, the court ruled favorably on the certification question and ordered respondents' prior counsel to show cause why he should not be enjoined from representing the class (Apdx. 168-74).¹⁷

Respondents characterize the district court's post-certification action as acquiescing "in repeated requests by petitioners for reconsideration of prior decisions" (Resp. Br. 7). Petitioners certainly had the right—indeed the obligation—to contest rulings which they considered to be erroneous. In fact, on several occasions, they were successful in persuading the district judge to change his mind and to overrule previous incorrect rulings. None of petitioners' attempts to protect their rights have been branded as unfounded by either the district court or the Court of Appeals. More importantly, however, there is no evidence that the matters raised by petitioners contributed in any way to delay in this case.

¹⁷ The district court in its subsequent decertification order indicated, albeit somewhat inartfully, that the six-month delay between the evidentiary hearing and class certification was at least partially due to the conflict of interest which ultimately led to the substitution of new counsel (Cert. Pet., p. A-2).

In referring to "the fourteen extensions of time (totalling approximately 190 days) obtained by petitioners during the litigation" (Resp. Br. 57), respondents fail to note that many of those extensions granted to the eleven petitioners ran concurrently, thereby having a net effect of considerably less than 190 days (Apdx. 2-6). Respondents likewise ignore the fact that they too have been granted seven extensions of time totalling 108 days during the pendency of the litigation (Apdx. 4, 7, 10, 11, 13, 15; letter dated May 23, 1974, from M. Green to Hon. H. K. Wangelin). These unopposed extensions to counsel played no part in the trial judge's evaluation of respondents' adequacy as class representatives. Rather, the delay referred to by the court in its decertification order was respondents' refusal to follow the program set up by the district court for handling the class action issues.

The principal cause of the many months of stagnation after class certification was respondents' failure to apprise the district court of the true status of the underwriters as potential defendants. Respondents do not deny that on the very day that their present counsel appeared in the case, the district court inquired whether any underwriters would be named as defendants. This was a logical inquiry concerning a fundamental matter that would affect the progress of the litigation. Yet, the district court did not receive a definitive answer from respondents for more than four months. Not until the district court issued an order directing respondents either to name the underwriters or to offer reasons for not doing so did respondents acknowledge that the statute of limitations had expired as to such claims during the period in which respondents were shielding their counsel's conflict of interest (Apdx. 186-87; Resp. Br. 9, 60). This extended delay in clarifying the status of the underwriters hindered the drafting and mailing of the notice to the class as well as substantive discovery.¹⁸

¹⁸ Respondents criticize the district court for taking more than four months to approve the form of notice to the class (Resp. Br. 9,

Finally, respondents try to obscure the effects of their conduct by repeatedly complaining about the partial stay of discovery imposed by the district court (Resp. Br. 4-6, 7-8, 13, 57, 62). They fail to appreciate the economy achieved by such a stay, first in focusing attention on the class issues and thereafter in avoiding duplication of discovery if additional parties are joined in the lawsuit. Thus, the stay was appropriate until the question of the underwriters' joinder was finally resolved. Moreover, once the stay was lifted to permit discovery of the names and addresses of the class members, respondents did nothing. Although the district court on October 23, 1975, directed respondents to proceed with discovery "as to finding the names and addresses of the class members" (Apdx. 189), respondents disregarded those instructions in favor of their own past practice. They deliberately chose not to make any effort whatsoever to obtain that information for six months and failed to commence formal discovery for more than nine months (Apdx. 200).¹⁹ The trial court's subsequent decertification order was premised upon its discretionary evaluation of this and other refusals by respondents to cooperate with the court and to follow its instructions; it was not based in any way on the lack of progress on substantive discovery (Cert. Pet., p. A-2).

57). As respondents know, that delay was not due to any lack of diligence by the district judge but rather was the result of a clerical error in the district clerk's office. The district court took the proposed notices under submission on December 5, 1975. Within one month it had approved the form to be sent to the class and had written letters enclosing copies to all counsel (Apdx. 14). Somewhere between the judge's office and the mailbox, probably in the clerk's office, those letters were misplaced. As soon as the court realized that counsel had not received the notice, a second letter was sent (Apdx. 14, 193). It is unfair for respondents to portray this mix-up as a manifestation of indifference by the district court.

¹⁹ The correspondence received from Punta Gorda's counsel did not contain any representations relieving respondents of the duties imposed by the district court's October 23rd order (Apdx. 176-77, 215).

The pattern which emerges from the record is not one of delay and foot-dragging by the district court or petitioners but rather a refusal by respondents to follow the directives of the district court. Respondents chose to ignore rather than cooperate with the district court's efforts to resolve the class action issues. They considered their methods superior to those adopted by the trial court and therefore sought to impose upon the court their own allegedly "standard practices" (Resp. Br. 10). Given this backdrop of events, as well as its own earlier stated misgivings about respondents' adequacy as class representatives (Apdx. 187-88), the district court certainly acted well within its discretion in decertifying the case as a class action.

Respectfully submitted,

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